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FILED
AUG 20 1982
ALEXANDER L. STEVAS,
CLERK

Number 81-2377

In The
Supreme Court of the United States

OCTOBER TERM, 1981

VERA GIANECHINI, INDIVIDUALLY AND AS TUTRIX OF THE ESTATE OF DAVID GIANECHINI AND AS EXECUTRIX OF THE ESTATE OF EARNEST GIANECHINI,
Plaintiff-appellant,

VERSUS

CITY OF NEW ORLEANS, NEW ORLEANS FIRE DEPARTMENT, ARTHUR TURNER, JOSEPH FRICANO, EARLY AMERICAN INSURANCE COMPANY, AND X, Y, AND Z INSURERS,
Defendants-appellees.

On Appeal from the
Supreme Court of Louisiana

MOTION TO DISMISS

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MAY IT PLEASE THE COURT:

On behalf of the City of New Orleans, the defendant-appellee against which plaintiff-appellant has taken this appeal, the Attorney General of Louisiana, through his undersigned assistant(s), hereby moves to dismiss the appeal taken to this Honorable Court in this case for the reasons set forth hereinbelow:

STATEMENT OF THE CASE

Without an acceptance of the veracity or accuracy of the factual allegations that form plaintiff-appellant's cause of action on the merits of her suit in tort, plaintiff-appellant's Statement of the Case, as it appears in her Jurisdictional Statement, is accepted here for its general descriptive quality for the limited purpose of this Motion to Dismiss, except as follows:

Plaintiff-appellant's Statement of the Case appears to indicate that her trial by jury against the two firemen was merely on an intentional act/gross negligence standard. However, the trial attorney for defendant-appellee city advises that the jury tried the case by special interrogatories, that the jury considered not only the alleged gross negligence of the "Good Samaritan" fireman but also his simple negligence as well (to guide the judge in imputing simple negligence to the city under the doctrine of *respondeat superior*), and that the jury found no negligence, either simple or gross. [Perhaps it should be noted that such a procedure concerning *respondeat superior* liability does not properly follow the true Louisiana practice on bifurcated trials; nevertheless, the fact that the jury did, in this case, pass on the simple negligence issue as well as the gross negligence issue and found no negligence at all is certainly relevant to, and actually militates against, the substantiality of this appeal.]

SUMMARY OF ARGUMENT

The appeal should be dismissed because it lacks a substantial federal question, because the judgment below rests on non-federal grounds, and because, for comity and reasons of balancing good cases offering good results against bad cases on the facts offering bad results, this case should be dismissed from an already overcrowded docket.

INSUBSTANTIAL FEDERAL QUESTION

Plaintiff-appellant's appeal ought to be dismissed because it fails to raise a substantial federal question.

Insofar as there may be a federal question asserted, it is insubstantial because the Fourteenth Amendment to the Constitution of the United States does not require states to provide jury trials in civil cases such as this one.

In a well-reasoned, exhaustive opinion on this subject, Judge Wisdom of the Fifth Circuit concluded, for the majority of a three-judge court, that a civil jury trial (especially the old Common Law type of civil jury) is not so implicit in the concept of ordered liberty in a cooperative federalism as to be required of the states by the Fourteenth Amendment. *Melancon v. McKeithen*, 345 F.Supp 1025 (U.S.D.C., E.D., LA, 1972) affirmed by this Honorable Court sub nom. *Mayes v. Ellis*, 409 U.S. 943, 93 S.Ct. 289, 34 L.Ed. 2d 214 (1972).

It has been consistently held that the Seventh Amendment provision regarding civil jury trials in Common Law cases is not applicable to the states through the Fourteenth Amendment. See, for example,

Edwards v. Elliot, 21 Wall. 532, 88 U.S. 532, 22 L.Ed. 487 (1874); *Walker v. Sauvinet*, 92 U.S.90, 23 L.Ed. 678 (1876); *Chicago, R.I. & P.R.R. Co. v. Cole*, 251 U.S. 54, 40 S.Ct. 68, 64 L.Ed. 133 (1919); *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 52 S.Ct. 69, 76 L.Ed. 214 (1931); Anno., 18 L.Ed.2d 1388, 1410-1412; and *Mayes v. Ellis*, supra.

Even the Seventh Amendment itself recognizes the difference between those civil cases arising under Common Law and those that do not. And it is submitted that Common Law never included civil cases for damages brought against the sovereign. Thus, cases brought against the sovereign by virtue of the sovereign's waiver of immunity do not really arise under the Common Law but rather by special fiat of the sovereign and only under such terms and conditions as the sovereign may have chosen to waive such immunity. See, for example, *Hill v. U.S.*, 453 F.2d 839 (6th Cir., 1972) and also all the cases against the United States of America under the Federal Tort Claims Act.

Here, it must be emphasized that we are speaking not of the peculiarities of Eleventh Amendment immunity, federalism, and the jurisdiction of Congressionally created lower federal courts. Rather, the issue raised on this appeal involves the state sovereignty that applies to the state and its agencies and subdivisions under state law and considered in cases where suit takes place in *state* court. It is the age-old sovereign immunity that applies to a state and its agencies and subdivisions to prevent them from being sued in their own *state* court (i.e., determining state court jurisdiction) without the sovereign's consent.

Louisiana's waiver of sovereign immunity is like that in *Hill* and other cases, supra, *conditional*. It is conditioned on, inter alia, non-seizure of public funds and property, availability of funds and legislative appropriations therefor, and also upon the legislature's power to enact procedural terms and conditions. Such are the terms spelled out by Article 12, Section 10, of the 1974 Louisiana Constitution, particularly in subsection "C" thereof as follows:

> § 10 Suits Against the State
>
> Section 10. (A) No Immunity in Contract and Tort. Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.
>
> (B) Waiver in Other Suits. The legislature may authorize other suits against the state, a state agency, or a political subdivision. A measure authorizing suit shall waive immunity from suit and liability.
>
> (C) Procedure; Judgments. The legislature shall provide a procedure for suits against the state, a state agency, or a political subdivision. It shall provide for the effect of a judgment, but no public property or public funds shall be subject to seizure. No judgment against the state, a state agency, or a political subdivision shall be exigible, payable, or paid except from funds appropriated therefor by the legislature or by the political subdivision against which judgment is rendered.

Pursuant to such distribution of powers, the legislature enacted R.S. 13:5105, prohibiting jury trials against the state, as one of the procedural terms and conditions given in return for the waiver of sovereign immunity.

This Honorable Court should not be misled by the citing of *Board of Commissioners of the Port of New Orleans v. Splendour Shipping & Enterprises Co.*, 273 So.2d 19 (LA, 1973). It is true that the Supreme Court of Louisiana, relying solely on the authority that sovereign immunity had, up to then, been only judicially created, abolished same also judicially in *Splendour*. However, the 1974 Constitution came subsequent to the *Splendour* case and supersedes *Splendour* to become the *one* existing authority on the manner of waiver of sovereign immunity. See *Skrbina v. Penna Dept. of Highways*, 468 F.Supp. 215 (U.S.D.C., PA, 1979).

There is nothing in the Constitution of the United States that prohibits a state and its agencies and subdivisions from enjoying sovereign immunity in such state's own courts. Likewise, there is nothing prohibiting a *conditional* waiver of that sovereign immunity (conditioned procedurally, among other things, on a trial by judge).

In this regard, it should be emphasized that plaintiff-appellant could have attempted to have the legislature grant her a special act of waiver containing a provision allowing a jury trial. Plaintiff-appellant, however, proceeded to take advantage of the general, but conditional, waiver as contained in Article 12, Section 10, of the 1974 Louisiana Constitution. Having relied on such conditional waiver to bring her suit, she should not now be able to complain about the terms and conditions of the very same waiver that she invoked and took advantage of.

The condition of the judge trial for a waiver of im-

munity is reasonable not only in light of the civil judge-versus-jury revelations contained in *Melancon v. McKeithen*, supra, but also in light of the peculiar status of the state, its agencies and its subdivisions, readily distinguishing them from the class of private persons. A private person does not exist solely for the common good of the whole society and body politic. If a private business corporation, for example, making ingots is sued civilly, found liable, and has its property or funds seized to pay the judgment, society simply may have fewer ingots on the market, and unemployment may be slightly higher. However, if the same thing happened to the city, for example, and society lost police and fire protection altogether or public health and hospital services, anarchy could and would result. Moreover a private person does not own or run jails or prisons and is not sued every day by inmates more than half of whose suits, though presenting colorable claims, are frivolous, cumulatively repetitious, and in forma pauperis. Having jury trials against a sovereign would mean not only a devastating waste and drain of the sovereign's resources providing jury trial after jury trial on such prisoner's suits but also a log jam in the state's civil court system that could never be unclogged. Thus, there is ample distinction—in history, in the Seventh Amendment and Fourteenth Amendment themselves (as interpreted by *Melancon v. McKeithen*, supra, and other cases), and in reality and practicality—for the sovereign (the state and its agencies and subdivisions) to waive sovereign immunity from suit in its own state court system reasonably upon the condition that the civil procedure used will be a judge trial.

Furthermore, all litigants who bring suit under Article 12, Section 10, of the 1974 Louisiana Constitution are faced with the same legal provisions and conditions. There is no distinction built into the law in that regard.

Despite plaintiff-appellant's assertion to the contrary, the treatment of claims against the United States on the federal level in the federal government's own system is analogous to the treatment of claims against a state and its agencies and subdivisions on the state level in the state's own court system. And as the former provides no trial by jury, so can the latter.

There is no substantial federal question here, therefore, in law.

Additionally, there is no substantial question raised on this particular appeal because of the facts and posture of the case itself as it comes to this court.

Even plaintiff-appellant herself admits in her Jurisdictional Statement,

> "No question is raised here as to the propriety of the jury's verdict dismissing the action against the firemen. Nor is there any appeal on the merits of the trial judge's decision on the City's liability." Jurisdictional Statement p. 5.

It is submitted that if there is no appeal, no error cited, on the outcome of the merits of her case, this appeal is insubstantial. If it does not make any difference—judge procedure or jury procedure—as to how a true and just verdict and judgment is rendered, then the complaint about the procedure used falls away. It is hardly reasonable to argue that one has a constitutional right to a

particular procedure (a jury trial) on the grounds and motivation that one might be able to arrive using sympathy or whatever, at an objectively unjust (though personally favorable) result different in outcome from the true and just result obtained from the complained-of procedure used (judge trial or at least bifurcated trial). It is submitted that nothing in the Constitution of the United States either means or intends to secure a right to an unjust, though personally favorable, judgment.

Plaintiff-appellant also argues that jury trials result in different verdicts than judge trials. Although she admits that it cannot be demonstrated, she indicates it is the common experience of the bar. However, in this very case, the jury, by special interrogatories passed not only on gross negligence but also the simple negligence of both of the firemen for purposes of *respondeat superior* liability on the city herein and found there to be no negligence at all. The only finder of any negligence was the judge! However, he properly ruled that such independent omission of the city did not cause the harm complained of.

THE JUDGEMENT OF THE LOWER COURT RESTS ON THE NON-FEDERAL GROUNDS

This appeal should be dismissed because the judgment of the lower court rests on the non-federal grounds. For these same reasons stated above—the jury's finding no simple negligence as to either fireman, the non-appeal herein on the merits of the outcome of the case below under state tort law, and the like—the final judgment in this case obviously rests on non-federal grounds.

OTHER GROUNDS

This appeal should be dismissed also because of federal comity, as a very sensitive *state* question concerning the terms and conditions under which the *state* has waived its sovereign immunity from suit *in its own state courts* is raised on this appeal, not really a federal question. As shown hereinabove, the facts and posture of this case militate against the substantiality of the issue raised because the jury in this case denied plaintiff-appellant recovery anyway, and not much good, but a lot of harm, could be done, as a pratical matter, in entertaining this particular case on an already overcrowded docket containing cases much more worthy of this Honorable Court's precious time, study, and analysis.

CONCLUSION

For the above reasons, plaintiff-appellant's appeal should be dismissed.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
Attorney General

/s/ Thomas S. Halligan

THOMAS S. HALLIGAN
Assistant Attorney General

/s/ Charles L. Patin, Jr.

CHARLES L. PATIN, JR.
Assistant Attorney General
Chief, Civil Division

PROOF OF SERVICE
CERTIFICATE BY BAR MEMBER

I, _____, one of the attorneys for the City of New Orleans, appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of August, 1982, I served copies of the foregoing Motion to Dismiss on:

1. The City of New Orleans, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, through City Attorney's Office, City Hall, New Orleans, Louisiana 70112.

2. The defendants, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

To Ronald J. Favre, Esquire
Attorney for City of New Orleans
901 First N.B.C. Building
New Orleans, Louisiana 70122

To John P. Nelson, Jr., Esquire
Attorney for Arthur Turner and
Joseph Fricano
1001 Howard Avenue
Suite 4304
New Orleans, Louisiana 70113

3. Curtis R. Boisfontaine, attorney for plaintiff/appellant Vera Gianechini, Sessions, Fishman, Rosenson, Boisfontaine & Nathan, 2500 Pan American Life, 601 Poydras Street, New Orleans, Louisiana 70130.

B-7561, 50, 8-82